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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 470

JANEL SALES CORP. and CARLTON DRUG, INC.,
Petitioners,

—against—

LANVIN PARFUMS, INC., by change of name LANVIN-CHARLES OF THE RITZ, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the United States District Court for the Southern District of New York, Inzer B. Wyatt, District Judge, appears on pages 814 to 833 of the appendix filed below and submitted herewith and appears at pages 19a to 31a *infra*. The opinion of the Court of Appeals for the Second Circuit appears at pages 1a to 18a *infra*.

Jurisdiction

The judgment of the Court of Appeals was dated and entered June 5, 1968.

Jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1).

Questions Presented

1. Does the McGuire Act sanction enforcement of Fair Trade pricing by injunction as between firms in competition with each other?

2. Does the use of state process for obtaining and enforcing injunctions create an immunity as to antitrust damage claims resulting therefrom, even though the use of such state process is in contravention of affirmative federal standards?

3. Is the legality of a customer limitation clause in a formal Fair Trade contract to be judged independently, and without reference to the propriety and lawfulness of the Fair Trade contract to which the customer limitation clause is ancillary?

Statutes Involved

The Statutes involved are Section 1 of the Sherman Antitrust Act, 15 USC Sec. 1, and the McGuire Act amendment to the Federal Trade Commission Act, 15 USC Section 45(a)(2)-(a)(5).

Statement

Each of the corporations that were parties plaintiff and are petitioners herein, operates a retail drug store featuring cut prices on well-known branded products. Defendant, respondent herein, is an established firm in the perfume and cosmetic industry, importing certain of its products

from France and offering all of its products as prestige items at relatively high prices. Respondent sells directly to retail outlets, to individuals and to other businesses at 40% off the list price. Respondent does not employ wholesalers in the marketing of its products.

Respondent also operates a Fair Trade program in the various states of the United States where Fair Trade laws are available to it, including the State of New York. Each retailer of respondent's products purchases directly from respondent and in New York is required to execute a Fair Trade contract with respondent. The Fair Trade contracts of respondent contain, among other things, a customer limitation clause confining retailers to sales to consumers only.

Petitioners have in the past obtained small quantities of respondent's Fair Traded products for resale by the process of diversion; that is purchasing from retailers with whom respondent did business. Petitioners sold such products to consumers at prices lower than the Fair Trade price set by respondent. Fair Trade injunction suits pursuant to State law were brought against petitioners by respondent, injunctions issued, and said injunctions have been enforced by means of substantial penalties. As the State courts are without jurisdiction to enforce Federal antitrust limitations, petitioners' McGuire Act defenses offered in the State courts were of no avail to them.

In July of 1963, petitioners filed their complaints against respondent charging violations of the Sherman Antitrust Act, 15 USC Sec. 1, alleging that respondent's Fair Trade contracts were unlawful as not being immunized by the McGuire Act, 15 USC Sec. 45(a)(2)-(5); that respondent's enforcement of its Fair Trade price structure against petitioners was unlawful; and that respondent had enforced a boycott as to petitioners by means of the customer limitation clause in its Fair Trade contracts.

On the trial of the consolidated cases in September 1967, it was established beyond dispute and by more than 4,000 of respondent's invoices, that respondent had sold substantial quantities of its products directly to consumers, some of whom were petitioners regular customers, at 40% off Fair Trade prices—at the same time it enforced its Fair Trade pricing structure against petitioners. (A48-A295, A349-A447)* A retail sales tax was collected by respondent as to the majority of these transactions.

Such selling by respondent of its products directly to consumers was not insignificant—such sales amounted to about 7% of its annual volume in New York City during the period covered by the complaint. Such sales were not sporadic, but rather were consistent and continuous, and were made to consumers in the vicinity of petitioners' stores and, indeed, to some customers of petitioners whose offices were in the same building as petitioners' stores. (A29-A30)

Jacob Rothman, an officer of plaintiff corporation, testified (A311):

> Q. I show you this one taken from Plaintiffs' Exhibit 11 in evidence and ask you to identify that one.
>
> A. This is dated June 14, 1962, Pop's Textiles Company, 488 Seventh Avenue, New York City, 30 pieces, $49.80, city sales tax $1.49, total $51.29.
>
> Q. I ask you, Mr. Rothman, you notice on these exhibits you just read from, Pop's Textiles, where is that in relation to the building in which your store is located?
>
> A. He has an office in that building.

Thus, it has been petitioners' consistent position throughout that respondent, by engaging in the retail selling of its products to consumers, was in fact in competition with

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* The references are to the Appendix in the Court of Appeals submitted herewith.

petitioners and was thus not permitted by law to utilize the limited privilege of Fair Trade, and that respondent's enforcement of its Fair Trade contract as against petitioners was without legal foundation. It was petitioners' further position that the contractual arrangements between respondent and its retail customers, having the obvious purpose and effect of depriving petitioners of access to respondent's products, even after the sale by respondent to its customers, constitutes an unwarranted restraint on alienation, and unreasonable restraint of trade adopted and enforced for the sole purpose of implementing the retail price-fixing program of respondent.

Jacob Rothman described one such incident (A324):

A. I went to Brittany Chemists, 9th Street and Broadway.

Q. What did you go there for?

A. I asked him to sell me Lanvin. I live near the store.

Mr. Keefe: I object.

The Court: Overruled. Go ahead.

A. He said he could not sell me any.

I said "Why not?"

He said "I signed a contract. If I sell it to anyone else, I will lose the line, and the line is too valuable for me to play around with it."

All sales by respondent to consumers, some of whom were customers of petitioners, were uniformly at 40% off respondent's fixed Fair Trade prices (A21). The anomaly of respondent's enforcement of its Fair Trade program against petitioners, compelling petitioners by legal process to adhere to the prices fixed by respondent, while at the same time respondent is actively engaged in selling to the same class of consumers in competition with petitioners at 40% off respondent's Fair Trade prices, is palpable.

In the District Court, the issue relating to respondent's retail transactions was taken from the jury and judgment issued thereon in favor of respondent. The customer limitation—boycott issue was tendered to the jury with a conspiracy charge (A33) and the jury found in favor of respondent thereon.

On October 19, 1967 respondent appealed. On June 5, 1968, the Court of Appeals affirmed the judgment of the District Court as to the customer limitation—boycott issue, and reversed and remanded the cause, limited to the issue relating to respondent's retail activities.

REASONS FOR GRANTING THE WRIT

1. The proper construction of subsection (5) of the McGuire Act, 15 USC Sec. 45 (a) (5), is of practical importance to the bar and to the Courts in the administration of a substantial volume of fair trade litigation.

The cases referred to in the opinion of the Court of Appeals illustrate the varying constructions of Subsection (5) of the McGuire Act now prevalent. Is the limitation of Subsection (5) to be confined to the exemptions as set out in Subsection (2), and with no application to Subsection (3)? In other words, does the mandate of Subsection (5) relate only to those who are parties to a Fair Trade contract, to the exclusion of non-signers?

In this case, the trial court rendered judgment after taking the question from the jury as to whether or not the respondent's activities made it a retailer. The Court of Appeals, in reversing and remanding, committed substantial error by stating that "the first question of fact is whether Lanvin is functionally a retailer". It has

been petitioners' position throughout that the proper question for the trier of fact is "are petitioners and respondent in competition with each other".

Other constructions of Subsection (5) now employed by the courts are to the effect that the phrase "in competition with each other" modifies the word "retailers", so that before Subsection (5)'s limitation of Subsections (2), (3) and (4) can become operative:

(a) A retailer must be in competition with the Fair Trade plaintiff, and

(b) The retailer must be party to a formal Fair Trade contract.

These constructions are now employed to exclude nonsigners against whom Fair Trade enforcement is obtained from recourse to Subsection (5) of the McGuire Act.

It is respectfully submitted that such constructions are unwarranted, both in terms of the legislative history of the Federal Enabling Acts and of the prior decisions of this Court, *U. S.* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, and *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384.[1]

It is respectfully submitted that this petition provides a timely opportunity for this Court to clarify the scope and application, in practical circumstances, of the exemption granted by the McGuire Act Amendment to the Federal Trade Commission Act, and the limitation of such exemption.

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[1] The Court of Appeals distinguished McKesson & Robbins by stating: "However, the Court was concerned with competing signers.".

2. It need be made clear that federal antitrust standards are sovereign and not subject to a "Reverse Pre-Emption" on the grounds of comity or otherwise.

On the trial of the action respondent urged the doctrine of collateral estoppel, predicated on its state court successes in obtaining and enforcing injunctions against these petitioners. The District Court properly refused this argument, tendered as a bar to federal prosecution under the Sherman Act. The issue was not briefed or argued or alluded to in any manner before the Court of Appeals. Yet in a footnote to its opinion, the Court of Appeals stated:

> "Of course, there can be no damages arising from the state court injunction, even if the issuance of it was in error. Plaintiffs' remedy for an erroneous state court decision rests in the state courts. See *Digaetano* v. *Texas Co.*, 300 F. 2d 895 (3 Cir. 1962); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544 (E. D. Pa.), aff'd 310 F. 2d 737 (3 Cir. 1962)."

It is palpable that State courts are without jurisdiction to entertain Federal based antitrust claims; neither are the opinions and judgment of State tribunals as to Federal antitrust issues authoritative. It is also apparent that State courts have no jurisdiction to confer immunity, indirectly or otherwise, on litigants as to any liabilities which have their basis in Federal law. To view the matter otherwise would give rise to a doctrine of State preemption that is alien and repugnant to established principles of Federal sovereignty.

As a practical matter, this footnote, although unsolicited, deprives petitioners of much of the damage predi-

cate needed to sustain their antitrust claims. It tends to remand them to the posture of strangers or bystanders without a damage nexus to the events in question.

It should not be the law that a Fair Trader can enforce an unlawful price fixing scheme, even to the point of obtaining substantial contempt of court penalties against petitioners, then exculpate itself from liability to petitioners for its wrongdoing on the incidental ground that state process was employed in the course of the wrongdoing.

The doctrine of State pre-emption as relating to a basic and pervasive Federal policy is disconcerting and potentially mischievious; the Court is respectfully urged to employ its supervisory jurisdiction in this case in the protection and vindication of Federal antitrust policy.

The prospect facing petitioners of retrying its case limited to the retailer issue, subject to the harsh discipline of the quoted footnote, albeit dicta, is most uninviting.

3. The Customer limitation clause of the respondent's fair trade contract can be properly considered only in the light of the legality of the price fixing scheme as applied to these petitioners and should be held illegal *per se* in a Sherman Act case.

In *U. S.* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, this Court held that post-sale restrictions relating to the parties to whom a product may be resold, are illegal *per se*. On the trial of this cause, petitioner requested this charge to the jury (A448 et seq.). The District Court refused to give the charge as requested, and instead, submitted the matter to the jury on a conventional conspiracy charge, eliciting from petitioners' counsel a statement that the Court's instruction was proper. There is nothing in

the record to suggest that petitioners' counsel agreed that the Court's charge should be substituted for petitioners' requested charge, and, in a general sense, the charge made to the jury was not objectionable, it was simply inadequate and incomplete.

The Court of Appeals erroneously decided the issue presented by imposing a condition precedent on the application of Schwinn to the facts of this case; such condition being that the enforcement of the offending customer limitation clause must be "firm and resolute". The Court of Appeals also relied upon the narrow technicality of the failure of petitioners' counsel to object to the charge, and the Court of Appeals also referred to the defense of respondent that the clause was meaningless and not enforced.

By such reasoning petitioner is deprived of the boycott features of its cause of action. This treatment of the issue by the District Court and the Court of Appeals not only precludes petitioners from a retrial on the boycott issue but is also in derogation of the standards set out in *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707.

It is respectfully submitted that the customer limitation clause (A298) is

a) Under Schwinn standards, illegal per se, and

b) Under Bausch & Lomb standards, would be illegal as part of an entire and unlawful resale price maintenance arrangement.

Since the judgment of the Court of Appeals is final and conclusive on the boycott aspects of petitioners claim, such would not be involved in the remand. Customer limitation clauses of similar import are widespread, being

employed by many firms engaged in franchising as well as Fair Trading, and are thus of sufficient import to merit the attention of this Court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 393—September Term, 1967.

(Argued April 5, 1968 Decided June 5, 1968.)

Docket No. 31852

JANEL SALES CORP.,

Plaintiff-Appellant,

—against—

LANVIN PARFUMS, INC. by change of name
LANVIN-CHARLES OF THE RITZ, INC.,

Defendant-Appellee.

CARLTON DRUG, INC.,

Plaintiff-Appellant,

—against—

LANVIN PARFUMS, INC. by change of name
LANVIN-CHARLES OF THE RITZ, INC.,

Defendant-Appellee.

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

* Of the First Circuit, sitting by designation.

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Wyatt, *Judge*, after a trial before a jury; the judgment was based on a directed verdict for defendant on the price maintenance issue and on a jury verdict for defendant as to the customer limitation issue. Reversed and remanded.

MORRIS SIEGEL, New York, N. Y., *for plaintiffs-appellants.*

MACDONALD FLINN, New York, N. Y. (White & Case, New York, N. Y., Thomas McGanney, New York, N. Y., and Fred Greene, New York, N. Y., of counsel), *for defendant-appellee.*

MOORE, *Circuit Judge*:

Defendant-appellee, Lanvin Parfums, Inc., by change of name Lanvin-Charles of the Ritz, Inc. (hereinafter Lanvin), produces, imports and sells fragrances and other cosmetics. During the years in question here, it had only two places of business, an office in New York City, and an office, warehouse and factory in Long Island City, New York. It averaged about $17,000,000 in national sales annually and about $3,000,000 in New York sales.

All of its sales were made at 40% off its recommended list price or, in States which had fair trade laws, at 40% off the fixed resale price. Most of its sales were made directly to retail dealers. However, the trial judge found that annually approximately $85,000 of the total sales were "accommodation" sales to employees, to firms which did business with Lanvin for their employees (e.g., Bankers

Trust), to employees of firms which dealt with Lanvin (e.g., Parents Magazine) and to persons who serviced Lanvin (e.g., the Pepsi-Cola delivery man). Approximately another $93,000 of its annual New York sales were termed "promotional" by the Court. Usually in larger quantities, these sales were either for the promotion of Lanvin and its customer together (e.g., American Airlines) or primarily for the customer's own promotional campaign (e.g., Paragon Containers). Most of these promotion sales were for the customer's own campaign. However, in both cases, the purchaser had to have had some prior business dealings with Lanvin (e.g., Paragon supplied it with containers).

Prior to the bringing of this suit, Lanvin had entered into fair trade agreements with several retailers in New York.[1] The standard contract provided, *inter alia*, that:

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1 New York General Business Laws §§369-a(1) and 369-b:

§369-a.

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name or the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

§369-b.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

(1) "Retailer" will not (except as specifically permitted by said Fair Trade Act) directly or indirectly advertise, offer for sale, or sell any of such "Commodities" in said State at less than the minimum retail prices stipulated therefor by "Manufacturer."

* * * * *

(6) "Retailer" will not, where statute or law permits such restriction, sell any of the "Commodities" except to consumers for use.

Lanvin diligently enforced clause (1). The evidence is conflicting as to how insistently it enforced clause (6), if it enforced that provision at all.

Janel Sales Corp. and Carlton Drug, Inc. (hereinafter plaintiffs) were large discount drug stores in New York City. Together they averaged approximately $650,000 in annual sales, roughly 7% of which is in the cosmetic field. They were not direct accounts of Lanvin and they were non-signers to the resale price maintenance contract; nevertheless, they acquired (by diversion from other retail stores) Lanvin's products and sold them at a slight discount.

Most of their sales were to individuals; in some instances, they sold to the same people who bought perfume from Lanvin at 40% off the fair trade price. Plaintiffs also sold cosmetics in bulk to various firms for gifts and promotional campaigns. Usually these businesses were in the neighborhood. Lanvin also sold its products to several businesses in plaintiffs' vicinity, including one company in plaintiffs' building (e.g., Pop's Textiles). These sales were for promotional campaigns and Lanvin made them at 40% off the fixed resale price. Nevertheless, Lanvin sought to enjoin plaintiffs from selling Lanvin perfumes to any of these customers at a price below the stipulated fair trade price.

The New York Court issued the injunction. *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1962 Trade Cases ¶70,563 (N. Y. Sup. Ct.); *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1963 Trade Cases ¶70,645 (N. Y. Sup. Ct.) *aff'd* 264 N. Y. S. 2d 212 (App. Div. 1965).

Plaintiffs brought this action (before Court and jury) for treble damages[2] and for injunctive relief, 15 U. S. C. §§15, 26, based on Lanvin's alleged violation of the Sherman Act, 15 U. S. C. §1. The district judge correctly ruled that the New York State decisions enjoining plaintiffs are not binding on the federal court, *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184 (2 Cir.), *cert. den.* 345 U. S. 923 (1955). Furthermore, he correctly recognized that whatever reach the New York courts might give the New York Fair Trade Laws, such decisions are subject to McGuire Act[3] limitations. *Sunbeam Corp.* v. *Masters, Inc.*, 157 F.

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2 Of course, there can be no damages arising from the state court injunction, even if the issuance of it was in error. Plaintiffs' remedy for an erroneous state court decision rests in the state courts. See *DiGaetano* v. *Texas Co.*, 300 F. 2d 895 (3 Cir. 1962); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544 (E. D. Pa.), *aff'd* 310 F. 2d 737 (3 Cir. 1962).

3 66 Stat. 631 (1952), 45 U. S. C. §§45(a)(1)-(a)(5):

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(*continued on following page*)

Supp. 689, 691 (S. D. N. Y. 1957). Nevertheless, in our opinion he incorrectly ruled (1) that Lanvin was not a "retailer" as a matter of law, and even if it were, the quantity of accommodation-retail sales was *de minimis* and (2) that as a matter of law the amount of competition between Lanvin and plaintiffs was irrelevant.

Therefore, he erred in directing a verdict on these two points.

I.

Price maintenance agreements are *per se* violations of the Sherman Act §1. This is true for horizontal contracts, as, for example, where two competing manufacturers contract not to sell below a specified price, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S.

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(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

211 (1951); it is also true for vertical agreements, as, for example, when a retailer of a specified product agrees with the manufacturer of the product not to sell it below a specified price. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911). However, such agreements, otherwise *per se* violations of the antitrust laws, may be immunized by federal statute. See *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). And the Miller-Tydings Act[4] was Congress' first immunizing statute in this area. In amending the Sherman Act §1, this Act provided for legal resale price maintenance in states in which such vertical contracts were allowed, providing, however, that the prior prohibition on *per se* horizontal agreements would be retained.[5] But in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), the Supreme Court held that this Act did not permit a producer to enforce a resale price maintenance contract against nonsigning retailers. In that Court's opinion, not only was such an interpretation not intended by Congress, but it would also be "price-fixing by compulsion."

Congress reacted to the *Schwegmann* case with the McGuire Act. It was passed as an amendment to the Federal Trade Commission Act,[6] and its primary purpose was to reverse the limiting features of the *Schwegmann* decision. The Report of the House Committee on Interstate Commerce, which accompanied the McGuire Act, declared that:

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4 50 Stat. 693 (1937), 15 U. S. C. §1.

5 "... That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment of maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 15 U. S. C. §1.

6 38 Stat. 711 (1914).

"The primary purpose of the bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act . . . . , to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distillers Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply."

Paragraphs (3) and (4) were newly added (paragraphs (2) and (5) were almost identical to the Miller-Tydings Act) to provide that if the State statutory scheme permitted price maintenance against nonsigners, such contracts would be immunized from antitrust violations. It was clear, however, that Congress purported to do no more. It did not intend to immunize additional horizontal arrangements. *United States* v. *McKesson & Robbins, Inc., supra* at 310-311. Paragraph (5) of the McGuire Act, as with the Miller-Tydings Act before, explicitly excepted contracts which fixed prices on a horizontal level.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity re-

ferred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

The legal issues in this case revolve about the proper interpretation of this exception paragraph.

II.

It is arguable that if the phrase "in competition with each other" modifies "retailers," there must be a showing, as there was not in this case, of some quantum of competition between the signing retailers and the manufacturer-retailer before the contract falls within the scope of paragraph (5). As a point of grammar, this interpretation is possible. However, even though the Supreme Court did not find it necessary to answer this question, see *United States v. McKesson & Robbins, Inc., supra,* the legislative history supports the conclusion that it is immaterial whether a manufacturer-retailer and a signing retailer are in actual competition.[7] As Senator Tydings, the author of the proviso, said:

"• • • The amendment provides that nothing in this particular provision shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, or retailers with retailers. This is made absolutely certain. I do not think it was necessary, but I was glad to put into place the matter beyond the peradventure of a doubt." 81 Cong. Rec. 7496.

7 Debate on HR 5767, 82nd Cong., 2d Sess., 1952.

If two retailers sign a price maintenance contract, regardless of whether they are competitors, then the contract is within paragraph (5) and, therefore, excluded from McGuire Act immunization from the Sherman Act. *Johnson & Johnson* v. *Avenue Merchandise Corp.*, 193 F. Supp. 282 (S. D. N. Y. 1961).

Thus, the first question of fact is whether Lanvin is functionally a retailer. The district court held as a matter of law that none of the accommodation sales were retail sales. It said:

> "[A]s a matter of human nature all manufacturers could be expected to follow this practice, and that they do so would not change their status from a manufacturer to that of a retailer."

Moreover, it found that even if the total of accommodation sales were at retail, the volume would be too insignificant to make Lanvin a retailer.

The term "retailer" is to be understood in its normal and customary manner. *United States* v. *McKesson & Robbins, Inc., supra* at 388. Indicia of a retail sale are the actual size of the sale, the dollar value of the sale, and the number of similar sales that are made. However, the principal focus must be whether " . . . the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the use of the commodity . . . purchased." *Roland Electric Co.* v. *Walling*, 326 U. S. 657, 164, *Parke, Davis & Co.* v. *Janel Sales Corp.*, 328 F. 2d 105, 106 (2 Cir.), *cert. denied*, 379 U. S. 835 (1964).

Nevertheless, it seems only common sense to exclude legitimate accommodation sales to employees from this general definition. These sales are merely incidental and accessory. *General Electric Co.* v. *Kimball Jewelers*, 132

N. E. 2d 652, 657 (Mass. Sup. Ct. 1956); *General Electric Co.* v. *Hess Brothers, Inc.*, 155 F. Supp. 57, 62 (E. D. Pa. 1957). However, as the sales spectrum broadens, the alleged accommodation sales may become a subterfuge for retail selling. For example, are sales to typewriter repairmen and Pepsi-Cola delivery men truly akin to employee accommodation sales in this case? And in what niche do Lanvin's sales to its attorneys fall? Are all these sales merely incidental and accessory? At some point, and this is a question of fact, these allegedly incidental "accommodation" sales may become true retail sales. And since reasonable men may differ as to the precise spot along the spectrum where the distinguishing line should be placed, the jury should have an opportunity to draw it. Reasonable men may also differ as to what quantum of retail sales is necessary to change the status of a producer to a functional retailer. Certainly $1 would be *de minimis*. But this is a case involving tens of thousands of dollars worth of accommodation sales. Again, the jury should have the opportunity to determine where the line is best drawn. If it is found, as a matter of fact, that Lanvin is a retailer, the resale price maintenance contract falls within paragraph (5) of the McGuire Act and the contract loses its statutory immunization.

III.

However, even if Lanvin is not considered a retailer, the contract will still violate the Sherman Act if it provides for resale price maintenance between competitors, regardless of whether these competitors are signatories to the contract. Lanvin disagrees.

First, Lanvin contends that the paragraph (5) exclusion was intended to exclude resale price contracts only in situa-

tions in which the signing parties are competitors. Primary reliance is placed on language in *United States* v. *McKesson & Robbins, Inc., supra* at 313, in which the Supreme Court, in striking down a wholesaler's resale price agreement with competing, signing wholesalers, said:

> "Congress thus made as plain as words can make it that, without regard to catalogues or labels, the crucial inquiry is whether the contracting parties compete with each other."

However, the Court was concerned with competing signers. From the whole opinion, it is clear that the Supreme Court was principally interested in horizontal competition. See *G. E. M. Sundries Co.* v. *Johnson & Johnson, Inc.*, 283 F. 2d 86, 92 (9 Cir. 1960).

Second, Lanvin relies on the statutory construction of paragraph (5) espoused in *Johnson & Johnson* v. *Janel Sales Corp.*, 192 F. Supp. 780 (S. D. N. Y. 1961). In that case, the court observed that paragraph (5) referred specifically, and only, to paragraph (2)—which protects fair trade contracts. On the other hand, paragraph (4) referred to both paragraphs (2) and (3). Therefore, it reasoned, paragraph (5) only exempts paragraph (2) contracts between competing parties from the McGuire Act immunization.

The court recognized, however, that such an interpretation opened a wide loophole. A producer might enter into a single resale price maintenance contract with a retailer. As long as the producer itself did not become a retailer in fact, it could enforce this fixed price against all sellers of its product, even though they might be competitors for commercial accounts or bulk sales. A producer might go further and attempt to hold the bulk sales competitor to the

fair trade price while at the same time setting his own price below that level.[8] This is what allegedly happened in this case. The court thought, however, that a "surgical operation too serious for the judiciary to perform" would be necessary to close the loophole.

We do not believe that the statutory language is so compelling. Underlying the court's reasoning is the assumption that the phrase "in competition with each other" refers to the parties who sign the "contracts or agreements." It is possible that the phrase refers to those parties for whom the resale "prices" are stipulated. If this interpretation were accepted, paragraph (5) would still exclude only paragraph (2) contracts, but the issue would be whether these contracts provided for the establishment of prices between competitors.[9]

The legislative history is not very helpful on this point. However, in passing the McGuire Act, Congress' principal purpose was to reverse the *Schwegmann* decision. That case had prohibited a producer from enforcing his price maintenance contract against nonsigning, noncompeting (with it) retailers. There is no indication that Congress intended to do more; in fact, there was constant concern with horizontal price fixing, either by agreement or compulsion.

Esso Standard Oil Co. v. *Secatore's Inc.*, 246 F. 2d 17 (1 Cir.), *cert. denied* 355 U. S. 834 (1957) supports our interpretation. In that case, Esso was denied an injunction against a nonsigning service station which sold to commer-

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8 Case comment, 75 *Harv. L. Rev.* 842 (1962).

9 Of course, we do not refer to the maintenance of a stipulated price among retailers when such a resale price is based on a legal vertical contract between a retailer and a producer. We are here concerned only with the situation in which it is the producer who may actively compete with parties bound, by State law, to the stipulated price.

cial accounts, for Esso also sold to commercial accounts. Therefore, since Esso and Secatore's were "corporations in competition with each other," the resale price maintenance contract entered into between Esso and other retailers could not support an injunction. The concurring opinion makes it clear that the crucial fact for the majority was that Esso and the nonsigning Secatore's were competitors. Accord, *Texas Co.* v. *DiGaetano*, 1963 Trade Cases ¶70,646 (Sup. Ct. N. J. 1963); *Gulf Oil Corp.* v. *Mays*, 1960 Trade Cases ¶69,821 (Sup. Ct. Pa. 1960). But cf. *Parke, Davis & Co.* v. *Janel Sales Corp., supra.* However, this last case is distinguishable, for the only question on appeal was whether Parke, Davis was a retailer. Moreover, there was no proof of any competition between Parke, Davis and a retailer.

Thus, the question is one of contractual interpretation. Does this resale price maintenance contract provide for the establishment of resale prices between Lanvin and its competitors? Although in some cases this might call for a more elaborate factual inquiry, see *Snap-On Tools Corp.* v. *F. T. C.*, 321 F. 2d 825, 834-35 (7 Cir. 1963), in this case, assuming *arguendo* that Lanvin and plaintiffs are competitors, there is no doubt. First, there was no contractual limitation on the type of sales to which resale price maintenance was to apply. Lanvin could easily have contracted, for example, not to fix resale prices for bulk sales to businesses for their promotional compaigns. Of course, if Lanvin had done that, it would not have been able to enjoin Janel from selling at a discount to these concerns. Such contractual limitations are not uncommon. For example, in *General Electric Co.* v. *Hess Brothers, Inc., supra* at 62 n. 6, the court commented:

> "• • • even if Plaintiff herein is considered to be in competition with defendant and other retailers for sales to the exempted groups, it has not required such competitors to meet minimum fair trade prices in sales to the exempted groups."

Accord *Parke, Davis & Co.* v. *Rocket Drugs, Inc.*, 214 F. Supp. 937, 939 (S. D. N. Y. 1963) (contractual exclusion of sales to hospitals, clinics, etc., from the minimum stipulated).

Furthermore, the State court has issued an injunction against plaintiffs. *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc., supra.* Still assuming that plaintiffs and Lanvin are competitors, this action must have been based on an interpretation of the contract which allowed for the establishment of a resale price between Lanvin and its competitors. See *Port Chester Wine & Liquor, Inc.* v. *Miller Bros. Fruiterers, Inc.*, 281 N. Y. 101, 22 N. E. 2d 253 (1939). We are of course obligated to accept the State's interpretation of the contract.

Therefore, there is a question of fact—are Lanvin and plaintiffs in competition with each other? A determining factor might well be whether or not there may be a substantial number of customers who might buy from either. Of course, they are not competitors simply because they share a common customer. However, as the number of customers grows, the more probable it is that reasonable men might find that the supposed accommodation sales were a subterfuge and that the companies were in competition with each other. Furthermore, the fact that Lanvin has termed many of these sales "promotional" does not necessarily prevent them from being competitive sales. It is for the jury to look behind the labels. Lanvin is, of course, free

to advertise and promote its own products as it wishes. But sales to Goldman Sachs & Co. for gifts at a dinner or sales to American Airlines for distribution in jet plane seats, both at 40% off the list price, are not solely for Lanvin's own promotional purposes. As these sales tend to benefit the purchaser's own promotional campaign, these buyers grow more willing to purchase the product from other available and competitive sources. Thus, they might become potential buyers from companies like the plaintiffs here. This is even more certain when these purchasers do business in plaintiffs' neighborhood. (E.g., *Pop's Textiles*).

As with the retailer issue, reasonable men may differ as to at what point Lanvin purchasers become probable customers of both Lanvin and plaintiffs. Moreover, reasonable men may also differ as to what volume of competitive sales will place Lanvin and plaintiffs in competition with each other. Therefore, the question—were Lanvin's sales "accommodation," "promotional" or competitive—would best be directed to the jury.

IV.

Plaintiffs also contend that the "customer limitation" clause (clause (6)) was a *per se* violation of the Sherman Act §1. They argue this position even though the jury gave a negative answer to the following question:

> Did defendant Lanvin agree, combine, or conspire with Royal Drug Store or Hubert Drug Company, or both, that Lanvin products sold to Royal Drug Store or Hubert Drug Company would not be resold to plaintiffs Janel and Carelton?

In the first place, plaintiffs did not take proper objection to the charge as required by Fed. R. Civ. P. 51. The dis-

cussion of this question concluded with the following remarks:

> "The Court: Well, Mr. Siegel, would you then, on the basis of what you tell me, say that the question properly to be submitted to the jury would be: Did defendant agree, combine, or conspire with Royal and Hubert that Lanvin products sold to Royal and Hubert would not be resold to plaintiffs?
>
> "Mr. Siegel: I would say so, yes.
>
> "The Court: You would say so?
>
> "Mr. Siegel: Definitely."

In the second place, the existence of such a contractual clause does not necessarily imply a *per se* violation. In *United States* v. *Arnold Schwinn & Co.*, 388 U. S. 365, 372 (1965), the Supreme Court premised its finding of a *per se* violation on the fact that Schwinn had been "firm and resolute" in insisting on compliance. Here, the evidence was conflicting on that issue. Plaintiffs' principal witness claimed that he was unable to buy Lanvin products from various retail stores; he claimed that the owners were afraid to sell to him, for if they did, they would lose the Lanvin line. Lanvin's witnesses contradicted this story. Moreover, Lanvin suggested that it never had, and never enforced, a policy against diversion. Consistently with the rest of this decision, we believe that this type of question, with the proper guidance from the judge, is best settled by the jury.

On the whole, the trial judge's charge was proper here. He made it clear that the agreement need not be express or formal, that the contracting parties need not directly state their object and purpose and that although the ques-

tion was stated in specifics, it was meant to ask whether or not direct accounts of Lanvin could not resell except to consumers. Since the jury answered the trial judge's question in the negative after this charge, plaintiffs' customer limitation argument is to no avail.

Reversed and remanded.

Opinion of the United States District Court

OPINION No. 34043

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Filed
U. S. District Court
September 26, 1967
1:02 P. M.
S. D. of N. Y.
/s/ J.M.

WYATT, District Judge,

MEMORANDUM ON MOTION BY DEFENDANT FOR DIRECTION OF A VERDICT

When all of the evidence had been taken in these cases and both sides had rested on September 21, 1967, defendant moved for a directed verdict. I decided the motion on the record at the time but stated that I would later file a memorandum of the reasons for the disposition made. This is that memorandum.

The charges in the complaints are made in paragraphs 12 and 13 thereof. When defendant some two years ago made a motion for summary judgment, plaintiffs, in their statement submitted to Judge Ryan under General Rule 9(g) of this Court "of the material facts as to which it is contended that there exists a genuine issue to be tried", formulated the issues tendered by their complaints. Their Rule 9(g) statement read in this respect as follows:

"There exists in this case genuine issues which must await a full trial as to the following matters, to wit:

1. That defendant is engaged in the retail business in competition with those persons, firms and corporations with whom defendant purports to fix the retail prices at which Lanvin products are sold and which are prohibited by 15 USCA 45 (a) 5.

2. That Lanvin has arbitrarily refused to sell its products to the plaintiff.

3. That Lanvin has boycotted and refused to sell its products to Lanvin's customers who sold such products to the plaintiff."

Judge Ryan found that there was at least an issue of fact as to the third matter above; he denied the motion for summary judgment by order with memorandum opinion, filed March 11, 1965.

At pretrial conferences shortly before this trial began, it was repeated for plaintiffs that the three issues to be tried were as stated; evidence was received at this trial on all three issues.

The conclusion I reached at the end of the trial was that the evidence did not justify submitting the first two claims of plaintiffs to a jury. I therefore granted the motion of defendant that a verdict to be directed in favor of defendant as to the first two claims. Procedurally this is covered by Fed. R. Civ. P. 50.

This memorandum will record some of the reasons for my conclusion and is primarily for the parties and for the appellate court, if the case should go there.

First, I recognize that after all the evidence is in, a verdict should normally be taken; if the judge finds it not supported, then he can set it aside. I recognize that the reason for this is to avoid the necessity for a new trial if the trial judge has made an error. This is set out in the *Fratta* decision, 139 F. 2d 743, and the *Lindeman* decision, 229 F. 2d 273, both in our Circuit; See also 2B Barron & Holtzoff § 1076. But I believed that this was an exception to the general rule and that I was required to direct a verdict as to two of the claims.

The first claim is of illegal price fixing, based on the agreements made in New York by defendant under the so-called fair trade laws—in New York the Feld Crawford Act, General Business Law §§ 369-a, 369-b.

This law in New York in substance permits the owner or producer of trademarked products to make a contract of sale of such products and to provide therein that the products may not be resold below a specified price.

Despite such state laws, the contracts described would be in and of themselves in plain violation of the Sherman Act. Expressly to exempt such contracts from the Sherman Act, Congress passed in 1937 the Miller Tydings Act, —now part of 15 U. S. C. § 1.

The New York law, however—in common with laws in many states—makes it an act of unfair competition if *any* person sells a fair trade product at less than the resale prices fixed in any contract signed under the terms of the law. In other words, the resale prices fixed in any New York fair trade contract are binding on everybody, whether a party to such a contract or—as usually expressed in this area—a "non-signer".

But in 1951 the Supreme Court in the *Schwegmann* decision, 341 U. S. 384, by 6 to 3, decided that the Miller

Tydings Act did not enable state law to bind non-signers to fixed resale prices.

Congress then in effect reversed the Supreme Court and in the McGuire Act, an amendment to 15 U. S. C. § 45, made lawful the exercise of any right created by state law against non-signers—exempting such action from the anti-trust laws.

The McGuire Act expressly provided that it did not make lawful, contracts "between retailers" which fixed resale prices.

What the plaintiffs say here in that Lanvin is a "retailer" as that word is used in the McGuire Act, that the fair trade contracts in New York between Lanvin and certain of its customers—admittedly retailers—are thus between retailers and not within the immunity of the McGuire Act and that, in consequence, Lanvin and its signing customers made illegal price fixing agreements.

It may be noticed in passing that the McGuire Act also does not make lawful any contract to maintain resale prices made between persons "in competition with each other". The contract referred to is that made by defendant for maintenance of resale prices. See in this connection the opinion of Judge Bryan in *Johnson and Johnson* v. *Avenue Merchandise Corp.*, 193 F. Supp. 282. Admittedly, defendant made resale price maintenance contracts, but not with these plaintiffs' and the names and locations of those with whom defendant made such fair trade contracts have not been shown. There was much evidence urged for plaintiffs as showing that defendant was in competition with *plaintiffs*. This evidence is irrelevant as far as the "competition" language of the McGuire Act is concerned; it may be relevant to show that

defendant is a "retailer" or it might be relevant on the question of damages.

The question as to the first claim is whether Lanvin is a "retailer".

As to this, there is no issue of fact and no question of credibility. The facts are undisputed. The only question is: what is the correct conclusion under the McGuire Act? Plainly the answer seems for the Court, not for the jury.

Defendant makes, imports and sells fragrances and other cosmetics having old, widely known, and valuable trademarks—such as Lanvin, Arpege, My Sin and others—and distinctive packages and advertising. It sells *for resale* only to direct accounts, all of which are stores which sell at retail. They are department stores, specialty shops, drug stores and others. Defendant does not sell to wholesalers or other distributors. All sales are made at 40% of the suggested retail price or in fair trade states, the fixed fair trade price.

The defendant has only two places of business an office in New York City and an office, warehouse and factory across the river in Long Island City. All sales are f.o.b. New York. The New York office in the relevant period—1959 through July 23, 1963—was at 767 Fifth Avenue in the Savoy-Plaza, later Savoy Hilton, Hotel. In the Savoy-Plaza Hotel there was also a display room or salon of defendant but not retail sales were made from this room at any time; it was for advertising, sampling, display, and information.

Judge Ryan, by order filed February 25, 1965, required defendant to produce certain invoices for inspection; to describe the order in brief, it related to those invoices

on which New York City sales tax was charged. The reasoning of plaintiffs behind such request for discovery must have been that any sale on which New York City sales tax was charged must be a sale for some purpose other than resale since New York City does not impose a sales tax on sales for resale. See City Rules & Regs. Art. 10. Since plaintiffs do business only in New York City, presumably they were interested only in non-resale sales of defendant within New York City.

The invoices were produced by defendant and examined by plaintiffs. Part of the invoices were classified by defendant as "promotional"—a term later to be explained. Plaintiffs made records of the total amount in each year of all the invoices produced, and a separate record of the totals of those invoices classified as "promotional". Plaintiffs also selected many invoices and had them copied. These were introduced in evidence but, of course, they do not reflect the total volume of the sales at issue because they were selected from larger group of the same type. The total volume of the sales at issue is reflected by the figures compiled by the accountant for plaintiffs during their inspection of all the invoices.

Evidence was produced by defendant of its total sales for the years at issue, and also its total sales in the State of New York.

The relevant data from the foregoing evidence is shown below as follows:

	1	2	3
	Total Net Sales	*Net Sales in Evidence (invoices)*	*Percentage 2 of 1*
1959	$13,841,247	$149,664.53	1.08%
1960	16,666,208	169,138.77	1.01
1961	18,182,401	228,464.01	1.26
1962	19,245,189	170,961.30	.89
	Total Net Sales	*Sales in Evidence excluding "promotional"*	*Percentage 2 of 1*
1959	$13,841,247	$ 92,215.83	.67%
1960	16,666,208	81,678.18	.49
1961	18,182,401	102,051.31	.56
1962	19,245,189	67,167.42	.35
	New York State Net Sales	*Net Sales in Evidence*	*Percentage 2 of 1*
1959	$2,579,294.95	$149,664.53	5.80%
1960	2,920,977.75	169,138.77	5.79
1961	3,289,474.20	228,464.01	6.95
1962	3,322,034.05	170,961.30	5.31

	New York State Net Sales	*Sales in Evidence excluding "promotional"*	*Percentage 2 of 1*
1959	$2,579,294.95	$ 92,215.83	3.58%
1960	2,920,977.75	81,678.18	2.80
1961	3,289,474.20	102,051.31	3.10
1962	3,322,034.05	67,167.42	2.08

Plaintiffs say that the nature and amount of the non-resale sales shown in column 2 above show that defendant is a "retailer".

The "promotional" sales, all made at 40% off retail price, are of two general types: (a) to businesses for the promotion of Lanvin's goods, goodwill, and name and (b) to businesses for the promotion of their own goods, goodwill, and name. Example of the first type are sales by Lanvin to Kayser-Roth for inclusion with their own products which are "Lanvin" stockings; sales to Avis for distribution in their rental cars; sales to American Airlines for distribution in jet plane seats; and the like. In substance, this first type is a joint promotion of Lanvin and the purchaser. Examples of the second type (and the second type was apparently much greater in volume than the first type) were to businesses for gifts to their employees or customers. For example, Consolidated Edison bought a substantial amount of perfume to be used as gifts to court attendants, because the company was so often in litigation; Bankers Trust bought perfume to be given to its employees; Goldman Sachs & Co., investment bankers, bought perfume for use as gifts at a banquet; Paragon, a container manufacturer, bought perfume for gifts to its customers. It appears that such sales were

made in most, if not all, instances to businesses having some connection with Lanvin (for example, Paragon supplied Lanvin with its boxes) but even if there were no connection of the purchaser with Lanvin, it would make no difference here because the sales in any event were not "retail" sales.

Before giving the reason for this last conclusion, it should be noted that there is no evidence that all "promotional" sales were disclosed to plaintiffs. This was not any fault of defendant, but was because, as the discovery developed, only sales with a New York City sales tax were sought by plaintiffs. It is possible that there were "promotional" sales with deliveries being made outside New York City; if so, no New York City Sales tax would have been payable (Tax Law § 1213) and invoices for such sales would not have been produced by defendant.

But this would not affect the result here because no "promotional" sales (as described above), wherever delivered, were "retail" sales.

The reason for this conclusion is that, in the context of the present problem, our Court of Appeals has applied, in determing whether a sale is "retail", the test laid down, in another context, in *Roland Electric Co.* v. *Walling,* 326 U. S. 657, 674 (1946), namely, whether "the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity . . . purchased". *Parke, Davis & Co.* v. *Janel Sales Corp.,* 328 F. 2d 105, 106 (2d Cir. 1964).

The sales made by defendant which were not for resale and were not "promotional" sales were sales to individuals for their own use (or family or friends). These,

of course, do not fall under the *Walling* principle but, on the facts here, such sales by defendant did not make defendant a "retailer" within the McGuire Act.

It may be noticed in this connection that—unlike "promotional" sales—the technique of discovery would reveal the total volume of sales by defendant to individuals. This is because the only offices of defendant were in New York City and the only sales to individuals, according to the evidence, would have to be from the New York City offices with delivery in New York City. If defendant therefore produced invoices for all sales with New York City sales tax, this should reveal the total of all sales to individuals.

The volume of such sales was as follows:

1959	$ 92,215.83
1960	81,678,18
1961	102,051.31
1962	67,167.42

These sales included sales to employees. Defendant had in New York City the following number of employees:

Year	Employees
1959	443
1960	556
1961	497
1962	485

These employees, according to a policy of defendant, were permitted to buy Lanvin products at 40% off retail but were limited to a purchase once a week to a maximum of

$50 per month; above that amount, special approval from a senior official was required.

Defendant also made sales at 40% off retail to post office and custom house employees with whom defendant did business, to policemen and firemen who performed services in and about the premises, to employees of magazines through the beauty editor of the magazine, to typewriter servicemen, to telephone men, to resident buyers of direct accounts (department store chains), to executives (or their families) of other perfume companies, to members of the Lanvin family, to Pepsi-Cola delivery men (there was a Pepsi-Cola dispensing machine in the Long Island City offices), to relatives of officials of defendants, to lawyers for defendant, to advertising men who did work for defendant, and to others. It appears that in all such cases the individual had to be known to defendant's organization as one who personally had some connection with defendant. For example and as I understand the evidence, defendant did business with the Telephone Company but would not on this account make sales to all employees of the Telephone Company; it would sell to those employees who came to defendant's premises—such as the telephone service men or who otherwise personally performed services for defendant. The same policy applied to postmen, customs officials, policemen, firemen, and the other types. Defendant called all such sales, "accommodation" sales.

No case has been cited (or found) dealing with such sales under the McGuire Act.

On the basis of everyday experience, however, I cannot believe that sales of such nature would make defendant a "retailer". It would seem to me that as a matter of human nature all manufacturers could be expected to

follow this practice, and that they do so would not change their status from a manufacturer to that of a "retailer".

Moreover, when the volume of such sales is compared to the total sales of defendant, it would seem that the relatively small volume of such sales would itself demonstrate that defendant was not a "retailer".

The second claim as to which a motion for a directed verdict was granted was, as posed by plaintiffs to Judge Ryan on the summary judgment motion, as follows:

> "That Lanvin has arbitrarily refused to sell its products to the plaintiffs".

As put, this states no claim because certainly any business may "arbitrarily" select its own customers so long as it is done as a matter of independent decision. *United States* v. *Arnold, Schwinn & Co.*, —— U. S. ——, 87 S. Ct. 1856, 1864 (June 12, 1967); *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).

Even treating the issue tendered by the second claim as one that defendant refused to sell plaintiffs as the result of some agreement, combination, or conspiracy, there is no evidence on which any such issue could be sent to the jury. In consequence, a verdict was directed on this issue. This appears to have been agreed to for plaintiffs (SM 580).

The third claim, as put to Judge Ryan, was as follows:

> "That Lanvin has boycotted and refused to sell its products to Lanvin's customers who sold such products to plaintiffs".

As thus put, there was no evidence at the close of the case in support of such a claim.

Being troubled, however, by some of the averments in paragraphs 12 and 13 of the complaint and by recent language in *United States* v. *Arnold Schwinn & Co.*, above at 1865 of 87 Sup. Co., and in the light of some of the evidence, I decided to submit to the jury the third claim by a specific question as follows:

> "Did defendant Lanvin agree, combine or conspire with Royal Drug Store or Hubert Drug Company, or both, that Lanvin products sold to Royal Drug Store or Hubert Drug Company would not be re-sold to plaintiffs Janel and Carlton?"

This form of question was agreeable to the plaintiffs (SM 589; see also 582) and was so put to the jury.

Dated: New York New York
September 26, 1967

/s/ INZER B. WYATT
Inzer B. Wyatt
United States District
Judge

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of June one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PETER WOODBURY,
HON. J. JOSEPH SMITH,

Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to the appellants.

A. DAVID FUSARO
Clerk

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IN THE

Supreme Court of the United States

October Term, 1968

No. 470

JANEL SALES CORP. and CARLTON DRUG, INC.,
Petitioners,

v.

LANVIN PARFUMS, INC., by change of name
LANVIN-CHARLES OF THE RITZ, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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September 30, 1968

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IN THE

Supreme Court of the United States

October Term, 1968

No. 470

JANEL SALES CORP. and CARLTON DRUG, INC.,
Petitioners,

v.

LANVIN PARFUMS, INC., by change of name
LANVIN-CHARLES OF THE RITZ, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 396 F.2d 398 and is printed in the appendix to the petition (1a-18a). The District Court's memorandum opinion is not reported but appears at 19a-31a.

Statutes

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Paragraph (5) of the McGuire Act, 66 Stat. 631, 15 U.S.C. §45(a)(5), provides:

> "Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

Statement of the Case

These are treble damage actions alleging violation of Section 1 of the Sherman Act. Two of the issues tendered to the District Court are pertinent to consideration of the petition.

Petitioners contended that respondent's fair trading was unlawful because it was a retailer and in competition with them. The District Court interpreted paragraph (5) of the McGuire Act as excepting from the antitrust ex-

emption granted by that statute only executed fair trade contracts (as opposed to non-signer enforcement) between retailers or between persons in competition with each other. A verdict in favor of respondent on this first issue was directed by the District Court on the grounds (1) that there was no evidence of competition between respondent and any retailer who signed its fair trade contract and that any alleged competition with petitioners would not preclude enforcement because they were non-signers, and (2) that on the undisputed evidence respondent's alleged retail sales (amounting to not more than sixty-seven/one hundredths of one percent of its total sales) did not make it a retailer (22a-30a).

On this first issue, the Court of Appeals reversed and remanded, holding that the District Court erred in directing a verdict on both these grounds. The Court of Appeals correctly concluded, as had the District Court (22a-23a), that "if two retailers sign a price maintenance contract, regardless of whether they are competitors, then the contract is within paragraph (5) and, therefore, excluded from McGuire Act immunization * * *" (10a). The Court of Appeals, however, held that whether respondent was a retailer was a question of fact and that the jury should have determined whether respondent's accommodation sales (not those to its own employees, but rather sales to others having some direct personal connection with it) were true retail sales[1] and, if so, whether the quantum of such sales was sufficient to make respondent a retailer. The Court of

1. See *Parke, Davis & Co.* v. *Janel Sales Corp.*, 328 F.2d 105 (2d Cir.), *cert. denied*, 379 U.S. 835 (1964); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657 (1946).

Appeals also held that "even if [respondent] is not considered a retailer, the contract will still violate the Sherman Act if it provides for resale price maintenance between competitors, regardless of whether these competitors are signatories to the contract" (11a). On this point, too, the Court concluded that the question was for the jury (*i.e.*, whether petitioners were in competition with respondent) (6a-16a).

A second issue tendered to the District Court was framed after the evidence was concluded. Respondent's fair trade contract purported to limit resale to consumers only. Petitioners urged that other retailers refused to sell respondent's products to them because those retailers had signed the fair trade contract or had been informed that diversion would result in their being cut off (DA58-DA62).[2]

The evidence, however, was strongly to the contrary. For example, contrary to petitioners' statement here that each New York retailer of respondent's products was required to execute its fair trade contract, the sole evidence was that respondent had such contracts only with several retailers in the State. Petitioners also point to testimony by their principal, Rothman, that the owner of Brittany Chemists told him, "I signed a contract. If I sell it to anyone else, I will lose the line. * * *" Brittany's owner, Goldman, flatly denied having any such conversation and testified that he told Rothman that he would not sell to him because "I didn't sell any Lanvin to anyone or any other items that I had * * *." In making that decision, Goldman testified, he was not in any way influenced by respondent. Indeed,

2. "DA" references are to respondent's appendix submitted to the Court of Appeals, ten copies of which have been filed together with this brief with the Clerk of this Court.

he could not even remember that he had ever signed respondent's fair trade contract. Moreover, there was ample evidence that respondent had not maintained a policy against diversion, and none of the retailers who refused to sell to petitioners was shown to have been influenced by the customer limitation provision of the fair trade contract or by any other act of respondent.[3]

When petitioners sought to frame the issue in terms of respondent's alleged inducement or coercion of retailers not to divert its goods, the trial judge advised that he would submit the issue to the jury in the form of a special question: Inquiring in the statutory terms whether there had been an agreement, combination or conspiracy in violation of Section 1 of the Sherman Act as alleged in the complaint, he asked, "* * * [W]ho are the co-conspirators?" Petitioners' counsel responded that in this sense the conspiracy was with two named drug stores.[4] The colloquy concluded on this note:

> "The Court: Well, Mr. Siegel, would you then on the basis of what you tell me, say that the question properly to be submitted to the jury would be: Did defendant agree, combine or conspire with Royal and

3. 3a, 22a; DA1-8, 12-13, 18, 23-32, 34-35, 43-49, 51-52, 54-56, 70.

4. "Mr. Siegel: Well, as far as I am concerned, the conspiracy in that sense took place between the Lanvin Corporation, through the use of their contracts with the Royal Drug, to whom they said, 'You cannot sell to Mr. Rothman or anybody else', and he did not want to sell because of the fact that he was told he would lose the line if he did. So there is that coercion on the part of Lanvin with another direct account.

"The Court: Well, then, you are telling me that the evidence as it stands now shows that the conspiracy claimed by the plaintiffs is a conspiracy between Lanvin and Royal?

"Mr. Siegel: And also the Hubert Drug, too, said the same thing" (DA62).

Hubert that Lanvin products sold to Royal and Hubert would not be resold to plaintiff?

"Mr. Siegel: I would say so, yes.

"The Court: You would say so?

"Mr. Siegel: Definitely" (DA63-64).

In charging the jury, the District Court put the special question in this form and carefully instructed as to the "agreement" requisite of Section 1. *Inter alia,* the trial judge charged that "When his products are sold * * * and their ownership passes from the maker, he may not, by agreement with the purchaser, control to whom the purchaser resells the product." Charging in the full language of the statute, the judge explained that petitioners claimed the evidence showed such an "agreement, combination or conspiracy."[5] He developed at length the meaning of that statutory requisite, advising that "the evidence need not show that the members [of a conspiracy] entered into any express or formal agreement or that they directly, by word spoken or in writing, stated between themselves what their object or purpose was to be." The trial judge concluded by advising the jury that a conspiracy is proved by showing that the members "positively or tacitly came to a mutual understanding to accomplish a common practice." When asked whether he had any exceptions to the charge, petitioners' counsel stated, "I do not take any exceptions" (DA67-68).

The jury found for respondent on this second issue. Petitioners then argued on appeal that the District Court

5. He specified, however, that "the plaintiffs do not claim that Janel or Carlton were the objects by name of such conduct, but that Royal and Hubert would not resell except to consumers" and therefore the argued effect was the same (DA67).

erred in failing to instruct the jury that the customer limitation provision in respondent's fair trade contract was a *per se* violation. The Court of Appeals held not only that petitioners had failed to take proper exception to the charge but also that the question whether respondent had in fact limited its retailers' sales of its products was, on the conflicting evidence, within the province of the jury and that the charge given on that issue was proper (16a-18a).

Before the Court of Appeals, petitioners outlined the course of respondent's fair trade proceedings against them in the State court and complained that an injunction had been obtained and thereafter enforced against them in contempt proceedings, with the result that "plaintiff Janel Sales was compelled to pay the sum of $1,430.44 to defendant and plaintiff Carlton Drug, Inc. was compelled to pay the sum of $1,452.93 to defendant." The Court of Appeals declared that, while the District Court had correctly ruled that petitioners were not collaterally estopped by the State court's decision and while those decisions were not binding upon Federal courts so far as interpretation of the McGuire Act, nonetheless "there can be no damages arising from the State court injunction, even if the issuance of it was in error" (5a, n. 2).

ARGUMENT

I

The Court of Appeals interpreted the McGuire Act just as petitioners urge it should be construed and that interpretation is not in conflict with the decision of any other Federal appellate court.

Petitioners declare that at all times it has been their contention that the lawfulness of respondent's fair trading turns upon the question of fact, "Are petitioners and respondent in competition with each other?" They argue that the Court of Appeals erred in stating that "the first question of fact is whether Lanvin is functionally a retailer" and that the remand is thereby improperly "limited to the issue relating to respondent's retail activities" (Petition, pp. 6-7).

Petitioners misconstrue the opinion of the Court of Appeals, which in fact gave them two strings to their bow. Since respondent's several fair trade contracts were executed by retailers, the Court of Appeals held that if respondent is also a retailer, regardless of whether it competes with the signing retailers, its fair trading is not immunized (9a-11a). As a second, independent ground for excepting respondent's fair trading from McGuire Act immunity under paragraph (5) of that statute, the Court also held, "However, even if Lanvin is not considered a retailer, the contract will still violate the Sherman Act if it provides for resale price maintenance between competitors, regardless of whether these competitors are signatories to the contracts" (11a). Thus it is clear that the remand per-

mits petitioners to offer proof of any competition between them and respondent. There is no need, therefore, to grant the writ on the basis of petitioners' unfounded fear that the remand is limited to the question of whether respondent is a retailer.

Petitioners also urge that paragraph (5) of the McGuire Act requires proper construction and clarification by this Court because "the cases referred to in the opinion of the Court of Appeals illustrate the varying constructions . . . now prevalent" (Petition, p. 6). The sole case cited by the Court of Appeals and standing for any of the constructions of paragraph (5) which petitioners find unwarranted was a District Court decision in the Second Circuit. *Johnson & Johnson* v. *Janel Sales Corp.*, 192 F. Supp. 780 (S.D.N.Y. 1961).

The Court of Appeals expressly disagreed with that decision and established as the law of the Second Circuit each and every construction of paragraph (5) for which petitioners contend. Moreover, as the Court of Appeals noted (13a-14a), its interpretation of the statute is squarely supported by *Esso Standard Oil Co.* v. *Secatore's Inc.*, 246 F. 2d 17 (1st Cir.), *cert. denied*, 355 U.S. 834 (1957). There is no conflict in decision or principle with any other Federal appellate court.

II

Upon conflicting evidence, resolved against petitioners by the jury, as to whether any resale customer limitation was effected, the charge (to which no exception was taken) was proper and poses no question of general consequence meriting review by this Court.

Before the Court of Appeals, petitioners contended, based upon *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), that the provision of respondent's fair trade contract purporting to limit resale to consumers only was illegal *per se* and that the jury should have been so instructed. In fact, petitioners never asked for any such charge. Instead they urged that the jury be instructed, "If the defendant *enforced* a prohibition restricting its retail outlets in their choice of customers, such restriction is additionally unlawful"[6]. (Emphasis added). The trial judge omitted this request because it was "covered in substance" (DA66) by the special question agreed to by petitioners and the far more detailed and informative charge heretofore discussed (pp. 5-6, *supra*).

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6. Petitioners argue here that the Court of Appeals erroneously imposed "a condition precedent on the application of *Schwinn* * * * that the enforcement of the offending customer limitation clause must be 'firm and resolute'" (Petition, p. 10). All that the Court of Appeals did was to note (17a), in the language of this Court, that Schwinn *had enforced* a resale limitation and that the enforcement was "firm and resolute" while in this case there was conflicting evidence as to any enforcement by respondent. Obviously, a resale limitation provision in a contract does not create a *per se* violation if it is meaningless, is not enforced, does not influence the purchaser's resale or, as here, is not even known to the bulk of purchasers because they have not signed any such contract. Petitioners' own request for a charge recognized that enforcement or adverse effect resulting from the provision was essential. Finally, the jury was never instructed that enforcement must be "firm and resolute."

Until the appeal, petitioners never objected to the procedure followed or claimed that the customer limitation issue as put to the jury ignored any part of their requested charge or their characterization of the evidence. Moreover, petitioners expressly disclaimed any exception to the charge (DA58-DA68). Fed. R. Civ. P. 51. In all the circumstances, the Court of Appeals correctly held that the charge was proper and the jury's verdict for respondent determined the customer limitation issue against petitioners. Moreover, the character of the charge in a particular action is not of such general consequence and import for other litigants as to merit further consideration by this Court.

III

Petitioners are not entitled to any damages arising out of the State court fair trade injunctions.

Petitioners instituted these actions in July, 1963, and the period of damages covered by the trial included the four preceding years. Respondent did not obtain fair trade injunctions against petitioners in the State court until October 31, 1962, and thereafter contempt fines were imposed in early 1963.[7] None of the State court determinations, including the adverse disposition of the McGuire Act contentions upon which petitioners have prevailed in these actions, was carried by petitioners to an ultimate appeal.

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7. See *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1962 Trade Cases ¶70,563 (N.Y. Sup. Ct.); *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1963 Trade Cases ¶70,645 (N.Y. Sup. Ct.), *affirmed*, 264 N.Y.S. 2d 212 (1st Dep't 1965); *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1963 Trade Cases ¶70,686 (N.Y. Sup. Ct.).

The Court of Appeals noted that the District Court had correctly ruled that the State court determinations were not binding upon it and that the Federal courts, not State courts, are the final arbiters in the event of any conflict between them concerning the McGuire Act limitations upon State fair trade laws. At the same time, in view of the remand it was ordering, the Court of Appeals, citing decisions by the Court of Appeals for the Third Circuit,[8] stated that "there can be no damages arising from the state court injunction, even if the issuance of it was in error" (5a, n. 2). Petitioners argue:

> "It should not be the law that a Fair Trader can enforce an unlawful price fixing scheme, even to the point of obtaining substantial contempt of court penalties against petitioners, then exculpate itself from liability to petitioners for its wrongdoing on the incidental ground that state process was employed in the course of the wrongdoing" (Petition, p. 9).

As noted, the State court fair trade enforcement proceedings placed no restraint upon petitioners until the last nine months of the four-year damage period available to them under the statute of limitations. In any event, if "an unlawful price fixing scheme" was thus enforced and if petitioners were thereby injured, they had remedies for avoiding such enforcement and injury by appealing to the highest State court or, if necessary, to this Court[9] for a

8. *Di Gaetano v. Texas Co.*, 300 F. 2d 895 (3d Cir. 1962); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544 (E.D. Pa.), *affirmed*, 310 F. 2d 737 (3d Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

9. 62 Stat. 929, 28 U.S.C. §1257. See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

correct construction of the McGuire Act and its limitations upon the State fair trade law.

That petitioners cannot claim damages based upon the State court enforcement when they elected not to exhaust available remedies is wholly consonant with principles of sound and orderly jurisprudence (a conclusion underlined by the fact that their damage claims are founded upon contempt fines of approximately $3,000 imposed when they chose to flout State court injunctions). Those principles are even more compelling in the context of antitrust cases, where any contrary result would allow petitioners to accept without protest an adverse lower court decision and then collect three times any damages they might have incurred.

Moreover, petitioners are not deprived of any recovery they might be entitled to even if "damages" arising from the State court injunctions were available to them. The injunctions merely required petitioners to sell at higher prices than they wanted to. Only if those higher prices reduced petitioners' volume of sales and resulting profits could "damage" have been caused by the injunctions enforcing respondent's fair trade prices.

Throughout the progress of these cases, however, it has been petitioners' claim that allegedly because of respondent's antitrust violations they were deprived of access to its goods in sufficient quantities to meet their needs.[10] At the trial, petitioners' sole evidence of damages was to the effect that they had been able to obtain only small percentages of the amount of respondent's goods they could have otherwise sold. With the customer limitation issue

10. See, for example, Petition, pp. 3, 5, 9-11.

finally determined against petitioners, they are now foreclosed from proof of damages on that theory. Consequently, it appears that petitioners' repeated references here to "substantial penalties" for contempt of court (Petition, pp. 3, 9) reveal the sole "damages" they have incurred. Petitioners appear to recognize that unless they are erroneously permitted to recover such "damages" they lack grounds for claiming even the reasonable costs and attorney's fees which the Clayton Act allows only to a claimant who establishes damages. Such circumstances furnish no basis for the exercise of this Court's supervisory powers.

Conclusion

For all of the reasons stated here, respondent urges that the writ should not be granted.

Respectfully submitted,

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